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Supreme Court of the United States,

OCTOBER TERM, 1930

No. 449.

E. S. SMITH,

Appellant,

vs.

W. B. CAHOON, Sheriff of Duval County, Florida,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA.

REPLY BRIEF ON BEHALF OF APPELLANT.

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THE BALLOU PRESS NEW YORK

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

REPLY BRIEF ON BEHALF OF APPELLANT.

To the arguments of the appellee this brief is addressed by way of reply. On the points and authorities discussed in our main brief we stand. In this reply brief we propose, by way of rebuttal only, to examine the premises on which the appellee bottoms his contentions.

IN REPLY TO APPELLEE'S CONTENTION THAT A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY, AS SET FORTH IN SECTIONS 2 AND 3 OF CHAPTER 13,700, LAWS OF FLORIDA, 1929, CAN BE CONSTITUTIONALLY REQUIRED OF THIS APPELLANT.

Significant are two initial propositions of the appellee.

First, the appellee joins us in the contention that "the purpose of Chapter 13,700 was to regulate the business of 'auto

transportation companies'" (Appellee's Br., p. 7). It is thus conceded, just as the Supreme Court of Florida held, that the statute is a regulation of the business of motor transportation and not a highway measure to regulate vehicle traffic on the public roads. Sections 2 and 3 of the Act, which contain the provisions relating to certificates of public convenience and necessity, by their express terms as well as by their place in legislative machinery designed to regulate the business of motor carriers, were framed to protect the business of those who are common carriers in fact by controlling competitive conditions. Protection or conservation of the highways is not involved. Sections 2 and 3 do not purport to regulate the use of the public highways. Such provisions regulate the business of those who are engaged in using them. By such concessions, inescapable though they were, the appellee has narrowed the field of controversy.

Second, the appellee contends that a certificate of public convenience and necessity can be constitutionally required of private as well as common carriers; in other words that all of the provisions of Section 2 and 3 of Chapter 13,700 are applicable *in toto* to a contract carrier such as appellant. Such was also the State Court's ruling. But the Court below did not rule, as the appellee has erroneously stated several times in his brief, that no provisions, other than those relating to the procurement of certificates of public convenience and necessity and the payment of the mileage tax could be constitutionally applied to a private carrier. As pointed out in our main brief, (pp. 24-27), one of the chief vices of the State Court's construction of this statute is that the Court failed to indicate what provisions besides Sections 2, 3 and 14 were applicable to private carriers. What other

provisions are applicable to private carriers is a question of conjecture pure and simple.

At the outset, then, the appellee concedes that Chapter 13,700 is a regulation of the business of motor transportation, and contends that all the provisions of Sections 2 and 3 are applicable to this appellant.

The appellee rests his argument that a certificate, such as the one set forth in Sections 2 and 3, may be lawfully required of this appellant, first, on the negative proposition that the statute does not require the appellant to become a common carrier; and, second, on the proposition that the provisions of Sections 2 and 3 contain regulations appropriate to a private carrier.

The appellee lays great stress on the fact that the court below held that Chapter 13,700 did not require a private carrier to become a common carrier. In the last analysis, his argument is that so long as a statute does not require a private carrier to hold himself out to serve the public indiscriminately, that is, does not require a private carrier to become a common carrier, such a statute is constitutional.

We stoutly contend that the result and effect of requiring under Sections 2 and 3 a certificate of public convenience and necessity, of the appellant is to place him in the status of a common carrier, is to force him to assume the burdens and duties incident only to public utilities. We submit that in addition to the limitation on the power of a state to compel a private carrier to become a common carrier there are other limitations, which prohibit a state from impressing upon a private carrier regulations purely incidental to the status of a common carrier. The case of *Frost* v. *Railroad Commission*, 271 U. S. 583, is squarely in point.

In the *Frost* case, the California Statute was held to be unconstitutional, not for the reason that a private carrier would be compelled to hold himself out to serve the public indiscriminately, but because the California Statute imposed duties and obligations (similar to those in Sections 2 and 3 of the Florida Statute) upon a private carrier which were peculiar to and applicable only to common carriers. In fact, this Court pointedly said on page 592 that: "The certificate of public convenience, required by Section 5, is exacted of a common carrier and is purely incidental to that status." In the *Frost* case, the court below had not ruled that the California Statute required a private carrier to become a common carrier in the sense that he was required to hold himself out to serve the public indiscriminately. 70 Cal. Dec. 464, 240 Pac. 26, 31. It was not such a ruling that this Court reversed. The Supreme Court of California had decided that regulations and restrictions "cognate and germane to the regulation of common carriers" could be constitutionally required of private carriers as a condition precedent to the privilege of using the public roads. And the decision of this Court in the *Frost* case, which reversed the California Court on the constitutional point, is direct authority for the proposition, which we urge, namely, that the state of Florida cannot by Sections 2 and 3 impose duties, burdens and regulations "germane and cognate to the regulation of common carriers" upon this appellant, admittedly a private carrier.

The appellee, however, contends that Sections 2 and 3 embrace requirements of a private carrier *qua* private carrier which are regulations appropriate to that kind of carrier.

A review of the pertinent provisions of Sections 2 and 3 is sufficient answer to the appellee's contention. Significant, among others, are the following:

(a) In Section 2 no one may engage in the business of private carriage "without first having obtained from the Railroad Commission a certificate that the present or future *public* convenience and necessity requires or will require such operation." The existence of a private business, neither noxious nor detrimental to the public welfare, is thus made dependent solely upon the discretion of a Railroad Commission whose primary function is to supervise and regulate common carriers and other public utilities. This public utility board may "suspend, revoke, alter or amend any certificate under the provisions of this Section." In other words, power is vested in a bureaucracy to destroy, curtail or condition a business which, by hypothesis, is a strictly private enterprise, and which beyond dispute is a legitimate and useful undertaking.

(b) Under Section 3 "application for such certificate of *public* convenience and necessity shall be made * * * to the Railroad Commission." In addition to the incidental information common to ordinary licenses, such as the name, address, place of operation, kind of business engaged in, the applicant must specify "the proposed time schedule of operation * * * the schedule or *tariff showing all* passenger fares or *freight rates* proposed to be charged between the several points or localities to be served" together with a time schedule of operation and a *schedule or tariff* for passenger fares or *freight rates* which have theretofore been charged. In *Terminal Taxicab Company* v. *Kutz*, 241 U. S. 252, 255-257, this Court specifically held that a carrier whose business "consists mainly in furnishing automobiles from its central garage on orders, generally by telephone * * *

is not to be regarded as a public utility * * *" and decided that "the plaintiff is not bound to give information as to its garage rates". This information was sought by the Public Utilities Commission of the District of Columbia. This Court concluded that the Commission should be restrained from further "inquiry into the rates charged by the plaintiff at its garage, or the exercise of jurisdiction over the same". As a condition precedent to obtaining a certificate of public convenience and necessity, a private carrier, under section 3, must surrender a constitutional right, defined and sustained as such by this Court. Or, in other words, here is a requirement "cognate and germane" solely to common carriers which the state of Florida demands of a private carrier.

(c) Upon the filing of an application for a certificate of public convenience and necessity "notice of such hearing shall be given to the applicant and *to all transportation companies serving any part of the route between the fixed termini*". This makes manifest that the primary purpose of Sections 2 and 3 is to protect the business of competing carriers, whether such carriers operate by rail or motor, whether common or private.

(d) "At or after such hearing the Commission may issue a certificate of *public* convenience and necessity, as prayed for or refuse to issue the same with modification, or upon such terms and conditions as in its judgment the *public* convenience and necessity may require". The test is set out as the public demand for adequacy and continuity of service—a dedication of a private carrier's property to the quasi-public use of transportation.

(e) As factors to be taken into consideration in determining whether a certificate should issue the Com-

mission is directed to inquire as to "the reliability of the applicant and his sense of responsibility toward the *public* as shown during the period of his operation; * * * the *effect* that the granting of such certificate may have *upon other transportation facilities* within the territory sought to be served by such applicant, and also the *effect* upon transportation *as a whole* within said territory, and any other matters tending to qualify or disqualify him *as a common carrier*". Can there be any doubt about nature of Sections 2 and 3? Every consideration is designed to assimilate a private carrier into the status of a common carrier.

(f) To one who applies "for a certificate to operate in a territory or on a line already served by a certificate holder under this article the Commission shall grant same only when the existing certificate holder or holders serving such territory fail to provide service and facilities to the satisfaction of said Commission". The Commission is thus given plenary power to control competitive conditions even to the length of prohibiting in the cause of adequacy and continuity of service to the public a private undertaking of a strictly private carrier. This is a very effective method of taking private property for public use without compensation.

To read these provisions is to see at a glance that they are not regulations of a private carrier *qua* private carrier; that they are not mere license requirements which can be met by complying with a prescribed course of conduct as in *Hendrick* v. *Maryland*, 235 U. S. 610. (It is hardly necessary to point out that these provisions are in no sense highway regulations resulting from the exercise of the power of a state to regulate the use of its highways.)

That Sections 2 and 3 are provisions "cognate and germane" to common carrier regulation is further evidenced by the fact, that the very certificate of public convenience, required by these two sections of a private carrier is also exacted of all common carriers. These provisions concerning certificate control are no whit different from the provisions of Section 5 of the California Statute and the other procedural provisions of the Public Utility Act of California (Stat. 1915, p. 115) which Section 7 of the California Auto, Stage and Truck Transportation Act adopts by reference. *Frost* v. *Railroad Commission,* 70 Cal. Dec. 464, 240 Pac. 26, 31.

On the authority, therefore, of the *Frost and Terminal Taxicab* cases we respectfully submit that the arguments on which the appellee relies to sustain the constitutionality of Sections 2 and 3 of Chapter 13,700, Laws of Florida, 1929, are unsound in the premises.

IN REPLY TO APPELLEE'S CONTENTION THAT CHAPTER 13,700, LAWS OF FLORIDA, 1929, AS CONSTRUED AND APPLIED TO THIS APPELLANT DOES NOT CONSTITUTE A DENIAL OF THE EQUAL PROTECTION OF THE LAWS.

The nub of the appellee's argument to support the exemptions in the Florida statute is found on page 31 of his brief. It is to the effect that "haulers of agricultural, horticultural, dairy, farm and fish products, from point of production to the primary markets, cannot always move on a fixed schedule on regular routes or between fixed termini", because "such movements are seasonal and temporary". But such contention entirely overlooks the initial definition of "auto transportation companies" as defined in Section 1 (h) of the Statute. If

carriers of agricultural and other raw commodities do not operate regularly between fixed termini or over a regular route, they are without the scope of the statute without need of specific exemption.

That there exist many carriers of agricultural, horticultural, dairy, farm and fish products who do operate regularly between fixed termini and on a regular route is implicit in the terms of the Statute. Otherwise, there would have been no necessity for the legislature to carve out the present exemptions. The initial definition of an auto transportation company, as pointed out above, is specific enough to exclude, without need of specific exemption, all carriers, both private and common, who do not operate between fixed termini or on a regular route.

The appellee would have us believe that the crops are seasonal in Florida, and that the movement of them is temporary. This in spite of the fact that there is but one season in Florida, the year round; this in spite of the fact some crops are being harvested, and others planted each day; and this in spite of the fact that crops are rotated year in and year out without end.

No claim of seasonal production can be made of dairy products. To exempt this large class of carriers, in and of itself, amounts to a glaring and unjust discrimination in favor of the dairying interests, resting on no reasonable ground of difference.

In Reply to Appellant's Contention That the "Mileage Tax" Levied by the Statute is not a "Toll".

The appellee attempts to characterize this levy as a license tax in the nature of a tax upon the franchise of operating

under a certificate of public convenience and necessity. To support this characterization he seeks to show that this appellant if operating under a certificate would enjoy privileges not granted to an ordinary motor vehicle operator, to wit, the permission to operate at a rate of speed in excess of the ordinary speed otherwise permitted by the laws of Florida. An examination of Section 11 shows, however, that this privilege could not be enjoyed by this appellant as it is not extended to carriers of freight but only to carriers of passengers.

The appellee argues that the "mileage tax" is in lieu of all other taxes and fees of every kind, character and description levied by the State of Florida, except *ad valorem* taxes levied upon the property of auto transportation companies; and except the gasoline tax; and except the motor vehicle license tax, and that it is, therefore, a demand of sovereignty and not a toll. The significant fact, however, despite the above language, is that the mileage tax is not in lieu of any taxes. Each and every tax levied on the appellant before this statute were saved by the exceptions in the statute.

In Reply to Appellee's Contention that the "Mileage Tax" is not Confiscatory and Unreasonable.

The appellee's claims that this levy is not confiscatory, alleging that at the present time there are many busses and trucks "now operating under the law and paying the tax" (p. 38). This is quite contrary to the recent report of the State Comptroller of Florida, wherein the total receipts of the mileage tax dating from October 1, 1929, when the payments were first made, to April 1, 1931, were only $151,721.26. The only inference to be drawn from these figures,

which include payments by all carriers operating under the statute, carriers of freight as well as passengers, carriers private as well as common, is that the vast majority of motor carriers subject to the statute has been driven out of business. The figures show that there could not have been over eighty or a hundred carriers throughout the whole of Florida operating under the statute during the past year and a half. This number is arrived at by dividing the total receipts by the amount an average truckman such as appellant would have had to pay, had he been permitted to carry out his contract with the A. & P., that is, on the basis of $1200 per year for the "mileage tax", or $1800 for the year and a half.

Throughout the appellee's brief is the intimation that motor vehicle carriers do not contribute their full share in return for facilities of public roads. That this is a popular misconception is demonstrated by Mr. Thomas H. McDonald, Chief of the U. S. Bureau of Public Roads, in a very intelligent discussion of the problem in Vol. 1 of the *Journal of Land and Public Utility Economics*, 385 "Commercial Vehicles on Free Highways"; and more recently in his testimony at the Interstate Commerce Commission Hearing on Rail-Motor Coordination under Docket 23400 at Washington, D. C., March 4th through March 17th. The result of his study and research is reflected in the following testimony:

> "In my judgment, the heavier trucks and busses by the higher tax which they are paying, and particularly through the collection of gasoline taxes, are fully meeting all excess costs of construction, due to the increased thickness that is made necessary by these heavier loads. It is a statement that will undoubtedly be contested but it will be contested largely because the effect on road

surfaces of applying loads through a much greatly increased area has never been given the consideration which it demands."

IN REPLY TO THE APPELLEE'S CONTENTION THAT NO SHOWING HAS BEEN MADE THAT THE STATUTE IMPAIRS THE OBLIGATION OF APPELLANT'S CONTRACT.

The appellee contends that this point cannot be urged by the appellant. We respectfully submit that the point is here properly presented and is raised in this Court on the record here.

In the petition for writ of habeas corpus, one of the grounds urged for the discharge of the appellant was that the statute impaired the obligation of appellant's contract (R. 3). The point was not passed on by the Supreme Court of Duval County for the reason that the Court, having held the statute unconstitutional on other grounds, did not find it necessary to consider all points raised by the appellant. Before the Supreme Court of Florida the appellant urged that the tax was unreasonable and confiscatory and argued that the imposition of the tax and certificate regulation would drive the appellant out of business. No one disputes the fact that the appellant was a private carrier engaged in the transportation of merchandise for the Great Atlantic & Pacific Tea Company under private contract at the time the statute became operative. Implicit in the argument that Chapter 13,720 would put the appellant out of business and thus prevent him from performing his contract is the contention that the statute impairs the obligations of appellant's contract.

The failure of the court below to discuss all the constitutional questions involved should not deprive us of the right

to argue this error before this Court. The impairment of the obligations of appellant's contract was assigned as error (R. 52). The Chief Justice of Florida allowed an appeal in which such error was assigned. The question we submit is properly before this Court.

In *Frost* v. *Railroad Commission, supra,* the Supreme Court of California, in upholding the constitutionality of the California statute, which was later declared unconstitutional by this Court, stated that the California Act could not be constitutionally applied to a carrier operating under contracts subsisting before and at the time of the statute's enactment. And on that ground the Court distinguished the case of *Michigan Public Utilities Commission* v. *Duke,* 266 U. S. 570, saying at page 30:

> "The essential difference between that case and this rests in the fact that Duke was operating under contracts subsisting before and at the time of the enactment of the Michigan statute, which contracts remained in part unperformed. The statute afforded to him no liberty of choice. It required him to devote his property at once to public transportation and thus would have disabled him to perform his subsisting contracts. To give it effect in its application to his situation would have been to impair the obligation of those contracts... If the contracts under which petitioners herein are operating had been entered into prior to the enactment of the 1919 amendment to our statute, and had been then subsisting and unperformed, petitioners would have been in position to invoke the authority of the Duke case. But petitioners' contract was not made until 1923, and they were under no compulsion to enter into it. * * *."

Conclusion.

In accordance with the foregoing, it is respectfully submitted that the decision of the Supreme Court of Florida should be reversed, and the case remanded with directions that the appellant be discharged.

Respectfully submitted,

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APPELLEE'S BRIEF

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APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA.

BRIEF OF ATTORNEY GENERAL OF THE STATE OF FLORIDA FOR APPELLEE.

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IN THE

Supreme Court of the United States

October Term, 1930

No. 449

E. S. SMITH,
Appellant,
vs.
W. B. CAHOON, Sheriff of Duval County, Florida,
Appellee.

Appeal from the Supreme Court of the State of Florida.

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF FLORIDA FOR APPELLEE.

REFERENCE TO THE REPORT OF THE CASE IN THE COURT BELOW.

The opinion of the court below was filed May 21st, 1930, and is cited as Cahoon, Sheriff, vs. Smith, 128 So. 632, 99 Fla. 1174.

The judgment was entered May 21st, 1930, and will be found on page 48, Printed Record.

STATEMENT AS TO JURISDICTION

On the 7th day of October, 1930, the appellant filed and served upon opposing counsel their statement on the jurisdiction of the court conformable to paragraph 1 of rule 12 of the revised rules of practice of this court.

On the 24th day of November, the Court announced its finding that probable jurisdiction had been shown under Sections 861 (a), 861 (b), of Title 28, United States Code, as amended April 26, 1928, and under Rule 46, United States Supreme Court, effective July 1st, 1928, Section 237 of the Judicial Code as amended by Act of February 13, 1925, Section 344, Title 28, United States Code.

STATEMENT OF THE CASE

This is an appeal from a final judgment rendered by the Supreme Court of the State of Florida in a habeas corpus proceeding, under which the Supreme Court of Florida upon a writ of error to the Circuit Court of Duval County, Florida, reversed a judgment ordering the discharge of the petitioner in habeas corpus proceedings brought by him on the ground that Chapter 13700, Acts of 1929, Laws of Florida, under which petitioner was being prosecuted, was unconstitutional as violative of certain provisions of the statutes and Constitution of the United States.

From the record in the Supreme Court it appeared that E. S. Smith owned and operated two motor propelled vehicles in the business of transporting property for compensation upon the public highways of the State between fixed termini and over regular routes, all within the State of Florida, not as a common carrier but as a carrier under special contract for a single shipper; that he had not made application for nor received a certificate of public convenience and necessity and had not paid to the Comptroller of the State of Florida an advance payment upon the mileage tax required by Chapter 13700, Laws of Florida, 1929, and that such failure being a misdemeanor under the statute, the said E. S. Smith had been committed to the custody of the appellee, W. B. Cahoon, as sheriff of Duval County, Florida, for trial.

Not being satisfied with his commitment Smith applied to a circuit judge for a writ of habeas corpus upon the ground that Chapter 13700, Acts of 1929, could not be constitutionally applied to the facts of his particular case, and upon hearing the circuit judge discharged the petitioner. The holding was that the Florida statute violated the Fourteenth Amendment to the Constitution of the United States, insofar as the same related to private carriers for compensation. (Record, pages 31-35.)

This holding of the circuit judge was under the Florida practice taken by writ of error to the Supreme Court of

Florida for review, and that Court reversed the holding of the circuit judge and issued its mandate that Smith should be held for trial on the charge made against him. (Record, page 48.)

The opinion of the Florida Supreme Court will be found in the Printed Transcript of the Record, pages 43 to 48, and its effect is to hold that the Florida statute as construed and applied by the Supreme Court of Florida to a business like that in which appellant was admittedly engaged is not violative of any provision of the Federal statutes and is not violative of any provision of the Federal Constitution.

SPECIFICATION OF ASSIGNED ERRORS

The object of this appeal is to have this Court declare the Florida statute unconstitutional on the following grounds embraced in the appellant's fourteen assignments of error: (Record, pages 50-53.)

1. That the statute denies the appellant the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

2. That the statute is repugnant to paragraph 2 of Article VI of the Constitution of the United States, and that it imposes a toll for the use of Federal Aid highways in violation of Section 9, Chapter 1, of the Federal Highway Act.

3. That the statute violates the Fourteenth Amendment to the Constitution of the United States in that it deprives appellant of his property without due process of law.

4. That the statute violates Section 10 of Article I of the Constitution of the United States, in that it impairs the obligation of contracts held by the appellant.

THE PARTICULAR STATUTE INVOLVED AND ASSAILED

The entire statute under attack is printed in an appendix to this brief. (Pages 41-58.)

The Act was passed at the 1929 Session of the Florida

Legislature and became Chapter 13700, Laws of Florida. Its pertinent provisions may be summarized as follows:

Section 1 defines the various technical terms used in the Act, and Section 2 prohibits the operation of motor vehicles by auto transportation companies except in compliance with the terms and conditions of the Act, as thereafter set forth.

Section 3 provides for applications by auto transportation companies for certificates of public convenience and necessity, and prescribes the form of such certificates when issued, as well as certain limitations governing the issuance thereof.

Section 4 requires the giving of bond by auto transportation companies for the protection of the public, after they are licensed under the Act.

Sections 5, 6, 7, 8, 9, and 10 confer certain jurisdiction and powers upon the Railroad Commission with reference to the regulation of auto transportation companies under the Act, and defines the character, scope, extent and limitations for the exercise of such powers.

Sections 11 and 12 impose certain duties and requirements upon auto transportation companies subject to the Act.

Section 13 prescribes penalties for violation of the Act.

Sections 14 and 15 fix the mileage tax and other taxes to be paid by companies subject to the provisions of the Act, while the remaining Sections 16, 17, 18, 19 and 20 lay down certain details of administration leading to the execution of the Act by the Railroad Commission and the Comptroller, and the disposition of revenue derived under it.

The Act became effective July 1st, 1929, and the first payment of mileage tax was required to be made October 1st, 1929.

ARGUMENT

Summary of the Argument

POINT 1. The statute applies to corporations and persons who use motor propelled vehicles in the business of transporting persons or property for compensation over the public highways of the State of Florida between fixed termini or over regular routes, whether such transportation for compensation is as common carriers or as carriers for particular persons under special contract, but the statute does not require private carriers to become common carriers.

POINT 2. The State has power to require a private carrier to secure a certificate of public convenience and necessity and become subject to regulations appropriate to that kind of carrier, in order to have the privilege of using the highways, even though it may not compel such private carrier to become a common carrier in order to operate as a private carrier.

POINT 3. Although Chapter 13700 may contain many provisions only applicable to common carriers and other provisions that perhaps are unconstitutional if attempted to be applied to a business like that conducted by the defendant, the other provisions of the Act regulating the business of defendant as an auto transportation company in its status as a private carrier can stand and be enforced.

POINT 4. There is nothing in Chapter 13700 which requires defendant to become a public carrier in order to secure a permit to use the public highways for transportation in the capacity he now has.

POINT 5. If the Railroad Commission should attempt to apply statutory provisions or rules or regulations inconsistent with the Constitution of the United States to the particular business of the defendant, his rights as the holder of a certificate of public convenience and necessity can be protected and enforced by appropriate judicial proceedings.

POINT 6. The Supreme Court of Florida has held that the requirements of the statute as to procuring certificates of public convenience and necessity for doing business on the highways, and as to the tax imposed on the business, may be reasonably applied to private carriers for compensation for the privilege of transporting for hire as a business on the public roads of the State in the exercise of the police and taxing power of the State to conserve the proper use of the public highways and to serve proper sovereign purposes, and that these requirements are severable from the other requirements of the statute which may be legally applicable only to common carriers, and are not intended to be applied to corporations and persons who are not common carriers.

POINT 7. The "mileage tax" levied by the statute is not a "toll" collected for vehicular passage over the roads, but is a license tax imposed upon the intrastate business of transportation for compensation on the public roads of the State, and being a license tax imposed upon the business by statute for public purposes, it does not violate *any* provision of the Federal Highway Act prohibiting "tolls."

POINT 8. Chapter 13700, Acts of 1929, does not deny the appellant the equal protection of the laws in violation of the Fourteenth Amendment to the Federal Constitution. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in inequality. The State has power to classify in the adoption of police laws, and one who assails a classification in such law must carry the burden of showing that it does not rest upon any reasonable basis but is essentially arbitrary.

POINT 9. The tax is not confiscatory nor unreasonable in a constitutional sense, nor is there any basis for the Court to so declare on the record here presented.

POINT 10. No showing has been made that the statute violates Section 10 of Article I of the Constitution of the United States or that it impairs the obligation of contracts held by the appellant.

ARGUMENT

POINT 1.

THE STATUTE APPLIES TO CORPORATIONS AND PERSONS WHO USE MOTOR PROPELLED VEHICLES IN THE BUSINESS OF TRANSPORTING PERSONS OR PROPERTY FOR COMPENSATION OVER THE PUBLIC HIGHWAYS OF THE STATE OF FLORIDA BETWEEN FIXED TERMINI OR OVER REGULAR ROUTES, WHETHER SUCH TRANSPORTATION FOR COMPENSATION IS AS COMMON CARRIERS OR AS CARRIERS FOR PARTICULAR PERSONS UNDER SPECIAL CONTRACT, BUT THE STATUTE DOES NOT REQUIRE PRIVATE CARRIERS TO BECOME COMMON CARRIERS.

It was the contention of the State in the Court below that the purpose of Chapter 13700 was to regulate the business of "auto transportation companies," whether common carriers or private carriers, so long as they operated motor vehicles for the purpose of transporting freight and passengers for hire between fixed termini or over regular routes along the highways of the State of Florida.

It was further contended by the State that as an incident to the purpose of the Act "to regulate the business of transporting persons or property for compensation over the public highways of the State" that the Act defined the term "auto transportation company" and included in that definition not only common carriers, but every kind of carrier, contract carrier or private carrier, who operated over the public highways between fixed termini or over regular routes.

The Court looks to the essential character of what is done, and if it appears that the essential character of the

business being transacted is that of an auto transportation company, although confined by contract to one particular shipper, who has enough business to supply the entire patronage requirement of the auto transportation company, the existence of such special contract does not destroy the essential character of the service being rendered, nor does it take such service out of the terms and purview of the statute which was designed to regulate not only the conduct of the business itself, but of the use of the roads employed in conducting it, and to impose a reasonable tax upon persons engaged in business of that character requiring the use of the roads.

The right of the State to regulate traffic over the highways by persons engaged in hauling persons and property for hire is not limited to the regulation of such business when done by common carriers, but extends to the so-called private carriers as well. This is clearly indicated by the opinion of this Court in the case of Packard vs. Banton, 264 U. S. 140, 68 L. Ed. 596, where the Court said:

> "The use of streets for gain is special and extraordinary, and generally may be prohibited and conditioned, as the Legislature deems proper."

The Florida Legislature in enacting Chapter 13700 had power to extend its regulation and tax over all vehicles for hire, when operated between fixed termini and over regular routes, whether common carriers or not, and the Supreme Court of Florida in its opinion definitely construed the statute as applying to corporations and persons who use motor propelled vehicles in the business of transporting persons or property for compensation over the public highways of the State of Florida between fixed termini or over regular routes, whether such transportation for compensation is as common carriers or as carriers for particular persons under special contract. (Record, page 45.)

But the Florida Supreme Court distinctly held that not all of the provisions of Chapter 13700 could be applied

to carriers under special contract as distinguished from common carriers.

In this connection the Court held that the statute should not be construed as being intended to require private carriers to become common carriers, and that therefore those provisions of the statute that are legally applicable only to common carriers should be held as not intended to be enforceable against and not applicable to corporations or persons who are not common carriers, though engaged in the transportation covered in general by the statute. And that inasmuch as the provisions of the statute that are legally applicable to private carriers for compensation were capable of being effectuated by themselves, leaving the other provisions that were legally applicable only to common carriers to be applied to such common carriers as are covered by the statute and not otherwise, that the statute so construed did not violate the Constitution and laws of the United States. (Transcript of record, 45-46.)

Turning its attention to the provisions of the statute which the Florida Supreme Court said could be applied to private carriers, as well as common carriers, the Court said:

> "The requirements as to procuring certificates of public convenience and necessity for doing the business on the highways, and as to the tax imposed on the business, may be reasonably applied to private carriers for compensation for the privilege of transporting for hire as a business on the public roads of the State, in the exercise of the police and taxing power of the State to conserve the proper use of the public highways and to serve proper sovereign purposes." (Record, page 46.)
>
> Cahoon vs. Smith, 128 So. 632, 99 Fla. 1174.

It will thus be seen that the Florida Supreme Court did not hold that all of the provisions of Chapter 13700, Acts of 1929, could be applied to private carriers but that only those particular provisions of the statute which required

the procurement of a certificate of public convenience and necessity and the payment of a mileage tax could be so applied, together with the incidental police regulations flowing from the grant of certificate under the Act.

In other words, the holding of the Supreme Court of Florida is limited to the proposition that the State had power to require carriers under special contract, who were not common carriers, to secure a certificate of public convenience and necessity, and become subject to regulations appropriate to that kind of carrier, and to pay a special mileage tax as provided by law in order to have the privilege of using the highways for the conduct of a private business for compensation.

POINT 2.

THE STATE HAS POWER TO REQUIRE A PRIVATE CARRIER TO SECURE A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY AND BECOME SUBJECT TO REGULATIONS APPROPRIATE TO THAT KIND OF CARRIER, IN ORDER TO HAVE THE PRIVILEGE OF USING THE HIGHWAYS, EVEN THOUGH IT MAY NOT COMPEL SUCH PRIVATE CARRIER TO BECOME A COMMON CARRIER IN ORDER TO OPERATE AS A PRIVATE CARRIER.

The constitutional power of a State to do this was distinctly recognized in the very case upon which the appellant most strongly relies for reversal of the judgment of the Court below.

Frost vs. Railroad Commission, 47 L. R. A. 457, 271 U. S. 583, 70 L. Ed. 1101.

In that case this Court distinctly said:

> "In other words, the case presented is not that of a private carrier who, in order to have the privilege of using the highways, is required merely to secure a certificate of public convenience and become subject to regulations appropriate to that kind of a carrier, but is that of

a private carrier who, in order to enjoy the use of the highways, must submit to the condition of becoming a common carrier, and of being regulated as such by the Railroad Commission. A certificate of public convenience required by Section 5 is exacted of a common carrier, and is purely incidental to that status. The requirement does not apply to a private carrier qua private carrier, but to him only in his imposed statutory character of common carrier. Apart from that signification, as far as he is concerned, it does not exist."

Thus we have an express recognition by this Court that a State statute undertaking to regulate a private carrier **in his status as a private carrier,** by requiring him to secure a certificate of public convenience and necessity and become subject to certain regulations appropriate to that kind of carrier, in order to use the highways as a means of conducting a business for profit, is entirely valid, provided it does not compel such private carrier to assume the burden of devoting its property to public use by engaging in the business of a common carrier in order to secure the benefits of the right to operate as a contract carrier only.

A state statute undertaking to make a regulation of this kind is sustainable as being within the police power under the authority of the State to regulate:

(1) The business done, because the nature of the business is such as to be peculiarly subject to the police power, and

(2) The use of the public highways owned by the State as a medium for the conduct of that business, because the highways are the property of the State and under its control and supervision.

Southern Motorways, Inc., vs. Perry, 39 Fed. (2nd) 145.

POINT 3.

ALTHOUGH CHAPTER 13700 MAY CONTAIN MANY PROVISIONS ONLY APPLICABLE TO COMMON CARRIERS AND OTHER PROVISIONS THAT PERHAPS ARE UNCONSTITUTIONAL IF ATTEMPTED TO BE APPLIED TO A BUSINESS LIKE THAT CONDUCTED BY THE DEFENDANT, THE OTHER PROVISIONS OF THE ACT REGULATING THE BUSINESS OF DEFENDANT AS AN AUTO TRANSPORTATION COMPANY IN ITS STATUS AS A PRIVATE CARRIER CAN STAND AND BE ENFORCED.

As we have pointed out heretofore, the Supreme Court of Florida has directly and in terms held that the several sections of the Florida statute are severable, and that the statute should not be construed as being intended to cause contract carriers to submit to those regulations provided in the statute which are appropriate only to common carriers.

This construction of the state statute by the Florida Supreme Court which is the highest court in the State is binding on this Court and the constitutionality of the statute here must be tested in the light of how it has been construed and applied by the Florida Supreme Court, and not according to the construction or application contended for by the appellant.

Osborne vs. Florida, 164 U. S. 650; 41 L. Ed. 586;

Fallbrook Irrigation District vs. Bradley, 164 U. S. 112, 41 L. Ed. 369;

Williams vs. Peyton, 4 Wheat. 77, 4 L. Ed. 518;

Dordy vs. Kansas, 272 U. S. 306, 71 L. Ed. 248;

Waters-Pierce Oil Co. vs. Texas, 177 U. S. 28, 44 L. Ed. 657;

Winchester vs. Winchester Waterworks Co., 251 U. S. 192, 64 L. Ed. 221.

The Court of original jurisdiction (the circuit judge hearing the habeas corpus application), seemed to think that the statute violated the holding of this Court in the **Frost case, 271 U. S. 583, 70 L. Ed. 1101, 47 L. R. A. 457.** (See Record, page 32.)

In that case, however, the main holding of this Court was that a private carrier was unconstitutionally deprived of his property without due process of law, **only** in the event that the State required him to become a public carrier in order to secure a permit to use the public highways for transportation purposes.

This is the principal authority relied on by the appellant in this case to reverse the judgment of the Supreme Court of Florida, and in fact is the sole basis for the appellant's contention that the statute violates that provision of the Federal Constitution which denies to the States the right to deprive any person of his property without due process of law.

In the **Frost case** this Court pointed out that in its opinion the Supreme Court of California had construed the statute under consideration as requiring Frost to become a common carrier if he wished to engage in the business of a private carrier, which requirement the Supreme Court of California had undertaken to justify on the ground that because the State had the power to prohibit the business of Frost entirely, it had the power to make him accept the burden of being a common carrier if he wished to transact his business over the highways as a private carrier.

It will therefore be noted that the sole question passed upon by this Court in the **Frost case** was the constitutional question whether or not the statute of California **as construed** violated the due process clause of the Federal Constitution.

This Court held against the statute, it is true, but it pointed out in its opinion that it so held **only because of the particular construction placed upon the statute by the Supreme Court of California.**

It also pointed out in its opinion that it so held, because the case presented was not that of a private carrier who, in order to have the privilege of using the highways, was required merely to secure a certificate of public convenience and necessity and become subject to regulations appropriate to that kind of a carrier only, but was that of a private carrier who, in order to enjoy the use of the highways, would have to submit to the condition of becoming a common carrier and of being regulated as such by the Railroad Commission of California.

In another case relied upon by the appellants, **Michigan Public Utilities Company vs. Duke, 266 U. S. 570, 69 L. Ed. 445**, the statute involved declared all persons using the highways for hire to be common carriers and thereby created all users of the highways for hire common carriers by legislative fiat.

No such case is presented here because the Florida statute contains no provision similar to that dealt with in the foregoing case either in terms or in effect.

Nor has the Supreme Court of Florida so interpreted or applied the statute as to lead to the same unconstitutional result that was complained of in that case.

POINT 4.

THERE IS NOTHING IN CHAPTER 13700 WHICH REQUIRES DEFENDANT TO BECOME A PUBLIC CARRIER IN ORDER TO SECURE A PERMIT TO USE THE PUBLIC HIGHWAYS FOR TRANSPORTATION IN THE CAPACITY HE NOW HAS.

In order to sustain the foregoing proposition made by us, it is only necessary to refer to the opinion of the Florida Supreme Court in the case at bar.

That opinion as we have pointed out distinctly negatives the idea that the Florida statute is intended to be applied or can be legally so applied as to compel private carriers securing a certificate of public convenience and necessity from the Florida Railroad Commission to there-

by assume and abide by the regulations of the Commission which are applicable only to common carriers.

On the contrary the Florida Supreme Court recognizes that only those provisions of the Florida statute relating to the procurement of certificates of public convenience and necessity by all carriers for hire between fixed termini and over regular routes, and requiring the payment of a mileage tax for the privilege of using the highways, and those provisions of the statutes which relate to the size, weight and speed of vehicles on the highways and the like, can be applied to private carriers.

We have already pointed out that under the repeated rulings of this Court such a construction of the Florida statute by its own Supreme Court must be accepted here.

POINT 5.

IF THE RAILROAD COMMISSION SHOULD ATTEMPT TO APPLY STATUTORY PROVISIONS OR RULES OR REGULATIONS INCONSISTENT WITH THE CONSTITUTION OF THE UNITED STATES TO THE PARTICULAR BUSINESS OF THE DEFENDANT, HIS RIGHTS AS THE HOLDER OF A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY CAN BE PROTECTED AND ENFORCED BY APPROPRIATE JUDICIAL PROCEEDINGS.

The foregoing proposition is clearly sustained by the holding of this Court in the case of Cargill Company vs. Minn., 180 U. S. 452, 45 L. Ed. 619, which seems to fully meet and obviate all Federal constitutional objections which might otherwise be successfully contended for by appellant in regard to Chapter 13700, even had the Supreme Court of Florida not construed the Statute as we have pointed out before.

In that case the contention was made that an Act of the State of Minnesota (similar in effect to the Act involved here) regarding grain elevators, was unconstitutional because it required all such elevators to procure a

license to operate and then imposed the duty on all elevators which were licensed under the statute to be common carriers, so to speak.

This Court refused to declare the Minnesota statute unconstitutional because of this and said:

> "That although the statute might contain many provisions unapplicable to warehouses like the one owned by the defendant, and other provisions that, perhaps, were unconstitutional when applied to a business like that in which the company was engaged, the provision requiring a license could stand and be enforced."

See 180 U. S. Text 466.

In another place in the same opinion the Court says (180 U. S. Text 468):

> "If the Commission refuse to grant a license, or if it seeks to revoke one granted, because the applicant in the one case, or the licensee in the other, refuses to comply with statutory provisions or with rules or regulations inconsistent with the Constitution of the United States, the rights of the applicant or the licensee could be protected and enforced by appropriate judicial proceedings."

We may concede that undoubtedly Chapter 13700 contains many provisions which are peculiarly appropriate to common carriers; that it possibly also contains provisions which are appropriate **only** to common carriers, and therefore cannot be applied to so-called private or contract carriers like the appellant pretends to be.

But these provisions are **separable**, and the record in this case does not show that the defendant in error is being required to comply with any regulation which would make him a common carrier, or with any term of the statute whatsoever other than to procure a certificate of public convenience and necessity, and to pay the tax

imposed upon him by law, neither of which is a regulation exclusively applicable to a common carrier under the Federal Constitution, nor solely appropriate to such carrier.

Clark vs. Poor, 274 U. S. 554, 71 L. Ed. 1199.

As we have pointed out, this Court has held that the State has the right to require even a so-called "private" carrier to take out a certificate of public convenience and necessity appropriate to that kind of carrier, and to observe rules and regulations applicable to him in his status as a "private" carrier.

This Court has also held that the State has the undoubted right to impose a mileage tax on persons using the public highways of the State upon which to conduct a gainful occupation in the carriage of goods.

Interstate Bus Corporation vs. Blodgett, 276 U. S. 245, 72 L. Ed. 551.

Sprout vs. City of South Bend, 277 U. S. 163, 72 L. Ed. 833.

The only prohibition on the State in this regard is that the State shall not require the so-called "private" carrier to become a common carrier, in order to enjoy his rights as a "private" carrier.

No case is presented by this record which shows that a private carrier is being compelled by a State statute to become a common carrier against his will. The only case presented here is a showing that the appellant Smith has failed to comply with a statute of the State of Florida which, properly construed, applies to him at least in part, and that therefore he has committed a violation of the criminal laws of Florida for which he was arrested.

Regardless of what else may be done to the appellant under Chapter 13700, the appellant can at least be compelled by the State of Florida to take out a certificate of public convenience and necessity, and to pay the mileage tax fixed by Chapter 13700, even in his status as an exclusively "private" carrier. There is, therefore, no

ground to complain of the constitutionality of the statute insofar as these two particulars are concerned.

Hendrick vs. Maryland, 235 U. S. 610, 59 L. Ed. 385.

The form of certificate of public convenience and necessity itself, fixed by Section 6 of the Act, contains nothing which indicates that by accepting such certificate a private carrier must become a common carrier, and consequently the appellant's contentions built up around the **Frost case** and the **Duke case** are obviously untenable.

Further, the **Cargill case**, supra, is a sufficient answer to all the contentions made by the appellant with regard to other provisions of the Act for the violation of which he is not now being prosecuted.

Upon the principles announced in that case the Supreme Court of Florida has sustained certain portions of Chapter 13700 as being constitutionally applicable to the appellant to the extent that he may be required to take out a certificate of public convenience and necessity and pay the mileage tax provided for by the Act, even though it be conceded for the sake of argument that other provisions of the Act if attempted to be applied to the particular business of the appellant could not be constitutionally so applied, so long as he maintains his status as an exclusively "private" or "contract" carrier.

So the appellant has in no wise in this case brought himself within the holdings of this Court in either of the two cases he relies on:

Frost vs. Railroad Commission, 70 L. Ed. 1101, 271 U. S. 583;

Michigan Public Utilities Commission vs. Duke, 69 L. Ed. 445, 266 U. S. 570.

POINT 6.

THE SUPREME COURT OF FLORIDA HAS HELD THAT THE REQUIREMENTS OF THE STATUTE AS TO PROCURING CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY FOR DOING BUSINESS ON THE HIGHWAYS, AND AS TO THE TAX IMPOSED ON THE BUSINESS, MAY BE REASONABLY APPLIED TO PRIVATE CARRIERS FOR COMPENSATION FOR THE PRIVILEGE OF TRANSPORTING FOR HIRE AS A BUSINESS ON THE PUBLIC ROADS OF THE STATE IN THE EXERCISE OF THE POLICE AND TAXING POWER OF THE STATE TO CONSERVE THE PROPER USE OF THE PUBLIC HIGHWAYS AND TO SERVE PROPER SOVEREIGN PURPOSES, AND THAT THESE REQUIREMENTS ARE SEVERABLE FROM THE OTHER REQUIREMENTS OF THE STATUTE WHICH MAY BE LEGALLY APPLICABLE ONLY TO COMMON CARRIERS, AND ARE NOT INTENDED TO BE APPLIED TO CORPORATIONS AND PERSONS WHO ARE NOT COMMON CARRIERS.

The sixth and seventh assignments of error filed by the appellant (Record, pages 51 and 52) are to the effect that the Supreme Court erred in holding and deciding that the State of Florida may validly convert the private property of appellant used exclusively in the business of a private carrier into public carrier property by compelling appellant as a condition to carrying private property by private contract over the highways of the State of Florida to submit himself to the jurisdiction of the Railroad Commission of the State of Florida, assume the burdens and duties of a common carrier and thus dedicate his property to public use and become a common carrier, in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

It is only necessary to refer to the opinion filed by the Supreme Court of Florida to demonstrate that these

assignments of error cannot be sustained for the simple reason, if no other, that the court has never made any such holding as that complained of.

On the contrary the Florida Supreme Court distinctly recognizes that the Legislature would have no authority to compel a motor vehicle carrier to subject himself to the jurisdiction of the Railroad Commission of Florida to the extent of assuming the duties and burdens of a common carrier and thus dedicate his property to public use and be a common carrier in order to use the highways of the State of Florida for public carriage for hire.

The opinion of the Court announces a directly contrary holding announcing that insofar as Chapter 13700, Acts of 1929, contains provisions and regulations **which are peculiarly applicable only to the business of common carriers** that such regulations do not apply to the appellant, nor is the appellant being arrested and prosecuted for failing to comply with any such regulations. (See Opinion of the Court, pages 45 to 46.)

What the appellant is being arrested and prosecuted for, is his failure to apply for a certificate of public convenience and necessity and his failure to pay the mileage tax provided for by the statute.

Appellant seems to be under the impression that if he applies for a certificate of public convenience and necessity and obtains one, that he will thereby submit himself to become a common carrier.

This is not true because the Supreme Court of Florida has said that no such legal effect will be imputed to the obtaining of a certificate by a private carrier, and even if the Railroad Commission of Florida should later attempt to visit on the appellant as a certificate holder any provision of the statute which could not be legally applied to a private contract carrier, he would have his remedy by due course of law to avoid compliance with that particular unlawful feature or regulation.

In this respect the holding of this Court in the Cargill case, supra, is a complete answer to these assignments of error.

POINT 7.

THE "MILEAGE TAX" LEVIED BY THE STATUTE IS NOT A "TOLL" COLLECTED FOR VEHICULAR PASSAGE OVER THE ROADS, BUT IS A LICENSE TAX IMPOSED UPON THE INTRASTATE BUSINESS OF TRANSPORTATION FOR COMPENSATION ON THE PUBLIC ROADS OF THE STATE, AND BEING A LICENSE TAX IMPOSED UPON THE BUSINESS BY STATUTE FOR PUBLIC PURPOSES, IT DOES NOT VIOLATE ANY PROVISION OF THE FEDERAL HIGHWAY ACT PROHIBITING "TOLLS."

Appellant also alleges the Florida statute to be unconstitutional because he says it violates the terms of the Federal Highway Act, commonly known as the United States Federal Aid law.

> Chapter 241, 39 Statutes at Large 355, as amended February 28th, 1919, Chapter 69, 40 Statutes at Large, 1189-1200; Compiled Statutes, 7477 bb, and the Federal Highway Act, November 9th, 1921; Chapter 119, 42 Statutes at Large, 212, Compiled Statutes 7477¼a.

In passing upon this point the Florida Supreme Court held:

> "The 'mileage tax' levied by the statute is a license tax imposed upon the intrastate business of transportation for compensation on the public roads of the State; and being a license tax imposed upon the business by statute for public purposes, it is not in law or in fact a 'toll' collected for vehicular passage over the roads, it not being collected for mere passage over the roads or 'exacted when and as the privilege of passage is exercised'."

(See Record, page 46.)

The Act itself provides that the mileage tax in question shall be in lieu of all other taxes and fees of every kind, character and description levied by the State of Florida, except ad valorem taxes levied upon the property of auto transportation companies and except the gasoline tax collected upon fuel sold for use in operating such vehicles. See Section 14, Chapter 13700.

The mileage tax provided for in the Act is not a toll for the use of the highways, but is an exaction in the form of a mileage tax to pay the cost of construction, maintenance and repair of the highways, and the administration and enforcement of laws governing the use of the same. The tax is laid on the business involving a use of the State's highways and not on the mere passage over the highways for the privilege of passage **per se.**

Such a tax has been held by this Court in a recent case not to violate any provision of the Federal Highway Act above referred to.

> Carley and Hamilton vs. Snook, 281 U. S. 66, 74 L. Ed. 704.
> (Williams vs. Riley, 280 U. S. 78, 74 L. Ed. 175.)

It is doubtful as to whether this question is before this Court in a proper way in this case since no showing is made by the record that the appellant (Smith) intended to confine his business or was confining his business exclusively to Federal Aid highways. It may be that the Supreme Court of Florida could take judicial notice as to what highways are Federal Aid highways in this State and it may be true that a considerable portion of the traveling done by the trucks owned by appellant is done over such Federal aid highways. **Non constat** the appellant was using the streets of Jacksonville and other roads which are public highways but not a part of the Federal system, consequently, became liable to the mileage tax for the use of these roads at least.

However, it is obvious that Section 14 does not impose nor undertake to impose a toll for the use of either State or Federal highways. The mileage tax in question is only

collectible by the Comptroller from those auto transportation companies, who have applied for and been granted certificates of public convenience and necessity permitting them to engage in the transportation of passengers or freight or both under the terms of the Act.

The tax in question while measured by the amount of mileage travelled by the licensee under the Act is really a tax on the special privilege which is embraced in the right to obtain and use a certificate of public convenience and necessity.

The rights conferred by a certificate issued under the Act are rights upon which the State has the legal and constitutional right to exact a tax, either in a flat amount or measured by the mileage travelled or the business done under the certificate.

The certificate operates as a protection to the licensee against certain burdens, which would otherwise be imposed upon it, as, for example, under Section 11 of the Act, an auto transportation company is permitted to operate motor vehicles on the public highways at a speed in excess of the ordinary speed otherwise permitted by the laws of Florida, while under Section 5 of the Act, the holder of such a certificate is protected from liability to comply with the local requirements of city and town ordinances as to regulation and taxation.

The mileage tax is consequently not a toll for the use of the highways, but is in the nature of a tax upon the franchise or license, which is embraced in a certificate of public convenience and necessity when used under the Act, although the amount of such tax may be measured by the number of miles travelled under such a certificate.

In **Hiers vs. Mitchell, 116 Southern, text 85**, the Florida Supreme Court defined a tax as an enforced contribution of money or other property assessed in accordance with some reasonable rule or apportionment by authority of a sovereign state on persons or property within its jurisdiction for the purpose of defraying the public expenses.

Applying this definition to the exaction required by Section 14 of Chapter 13700, it is plain that such exaction is a tax and not a toll. Indeed, the Act itself positively and in terms denominates the same as a tax as will be seen from the following quoted portion of Section 14:

> " * * * Provided further, that the mileage tax provided for in this section shall be in lieu of all other taxes and fees of every kind, character and description, except ad valorem taxes levied upon the property of such auto transportation companies and except the gasoline tax, and except the motor vehicle license tax as now provided for in Section 1285 (1011) Compiled General Laws of Florida, 1927; said motor vehicle license tax to be paid into the State Treasury and disposed of as provided for in Section 1304 (1031), Compiled General Laws of Florida, 1927, * * *"

POINT 8.

CHAPTER 13700, ACTS OF 1929, DOES NOT DENY THE APPELLANT THE EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION. A CLASSIFICATION HAVING SOME REASONABLE BASIS DOES NOT OFFEND AGAINST THAT CLAUSE MERELY BECAUSE IT IS NOT MADE WITH MATHEMATICAL NICETY OR BECAUSE IN PRACTICE IT RESULTS IN SOME INEQUALITY. THE STATE HAS POWER TO CLASSIFY IN THE ADOPTION OF POLICE LAWS, AND ONE WHO ASSAILS A CLASSIFICATION IN SUCH LAW MUST CARRY THE BURDEN OF SHOWING THAT IT DOES NOT REST UPON ANY REASONABLE BASIS BUT IS ESSENTIALLY ARBITRARY.

One of the provisions of the Act is that it shall not apply to "corporations or persons engaged exclusively in the transportation of children to or from school, or

any transportation company engaged exclusively in the transporting agricultural, horticultural, dairy or other farm products and fresh and salt fish and oysters from the point of production to the assembling or shipping point en route to primary market, or to motor vehicles used exclusively in transporting or delivering dairy products or any transportation company engaged in operating taxicabs or hotel busses from a depot to a hotel in the same town or city." (See paragraph "h," Section 1, Chapter 13700.)

Such a distinction in legislation of this character is not deemed to be arbitrary if any reasonable facts can be thought of to sustain it.

Rast vs. Van Deman & Lewis Co., 240 U. S. 342; L. R. A. (1917-A) 421; (Florida case).

The fact that the act could have been extended to embrace those who are excluded is not necessarily proof of unjust discrimination or of denial of equal protection of the laws. All state laws need not be perfect nor is it necessary that they cover the entire field of permissible legislative action at one time.

Middleton vs. Texas Power and Light Co., 249 U. S. 152.
Rosenthal vs. New York, 226 U. S. 260.

Even the crudities and injustice of state laws cannot be redressed by the Fourteenth Amendment to the United States Constitution. A wide field of legislative discretion is accorded to the legislature both in the selection of subjects and in the extent to which the subject shall be legislatively dealt with.

Heath & Milligan Co. vs. Worst, 207 U. S. 355.
Chicago Dock & Canal Co. vs. Fraley, 228 U. S. 680.

Local conditions known to the Legislature but unknown to the courts may have a large bearing on a case involving a claim of denial of equal protection of the

laws, and if the court can conceive of any local conditions which will warrant the classification made, the courts will not interfere to strike the legislation down as a denial of equal protection of the laws.

Dominion Hotel Co. vs. Arizona, 249 U. S. 265.

The Supreme Court of the United States has sustained laws particularly regulating wholesale dealers in oils while not undertaking to deal with wholesale dealers in any other commodity.

S. W. Oil Co. vs. Texas, 217 U. S. 114.

There is a strong presumption that discriminations in state legislation are based on adequate grounds, and the mere fact that a law regulating certain classes might have included others does not condemn it under the equal protection clause.

Middleton vs. Texas Power & Light Co., 249 U. S. 152.

The burden being upon him who attacks a law for unconstitutionality, the courts need not be ingenious in searching for grounds of distinction that may be subjected to criticism. There is a strong presumption that the Legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by its experience, and that its discriminations are based upon adequate grounds. The equal protection clause does not require that state laws shall cover the entire field of proper legislation in a single enactment. Even if the act might well have extended to other classes of persons, this would not amount to a constitutional objection.

Patsome vs. Pennsylvania, 232 U. S. 144.
Keokee Coke Co. vs. Taylor, 234 U. S. 224 (227).

The 14th Amendment does not prohibit state legislation special in character. The Legislature may deal with

a class which it deems a conspicuous example of what it seems to prevent, altho logically that class may not be distinguishable from others not embraced by the law. The Federal courts cannot review the economics of facts upon which the Legislature of a State bases its conclusions. On this principle it has been held by the Supreme Court of the United States that a classification which affects only those who deal in more than one place in the state is not necessarily so unreasonable as to deny equal protection of the laws.

Central Lumber Co. vs. South Dakota, 226 U. S. 157.

Raymann Brewing Co. vs. Brister, 179 U. S. 445.

It has even been held that a classification may be made based on size alone.

Engel vs. O'Mally, 219 U. S. 126.

Where it does not appear upon the face of the statute or from facts of which the court can take judicial notice, that it infringes rights secured by the fundamental law, the Legislature's determination of questions of policy is conclusive on the courts. The power which the legislature has to promote the general welfare is very great, and the employment of means to that end is very large. The possibility of the abuse of legislative power does not disprove its existence.

Powell vs. Pennsylvania, 127 U. S. 678 (685).
Am. Sugar Refining Co. vs. La., 179 U. S. 89.

No rule is better settled than the one that constitutionality of a classification made is to be determined by considering whether there is any basis for the classification made by the statute.

Finley vs. California, 222 U. S. 28.

One of the leading United States Supreme Court decisions on the subject of classifications in legislation is:

Lindley vs. Natural Carbonic Gas Co., 220 U. S. 61 wherein was laid down the principle enunciated by the Florida Supreme Court in Hiers vs. Mitchell, 116 So. 81, wherein the Court said:

> "The equal protection clause of the Fourteenth Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and is purely arbitrary. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality.
>
> When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.
>
> One who assails the classification in such law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

Hiers vs. Mitchell, 116 So. Text 86.

Applying the foregoing principles, let us see whether or not the appellant has made it appear that no state of facts can be conceived, that would sustain the classifications made.

Strictly speaking, the law does not make exemptions of the classes of persons hereinbefore referred to, but rather by way of explanatory language makes it clear that certain lines of business shall not be construed as being within the scope of the subject dealt with by the act, and therefore excluded from its intent, altho apparently within its terms if broadly interpreted.

The first class dealt with is that class of persons and corporations engaged in hauling school children. As

a matter of fact, the statement of this exception is probably unnecessary, because the children are usually hauled free on contracts with the school authorities and would not be within the purview of the act anyway. At any rate, this exception merely follows out the same kind of exception which has been in the motor vehicle license law for many years:

> "* * * Provided, further, that motor vehicles used for transporting school children to and from school under contract with school officials shall not be deemed to be in use for hire."
>
> Section 1280, Comp. Gen. Laws.

The next class excluded are those engaged **exclusively** in the transporting agricultural, horticultural, dairy and other farm products and fresh and salt fish and shrimp from **point of production** to the assembling or shipping point **en route to the primary market.** This exception also follows a similar one made in the general motor vehicle license law and was no doubt made for the same reasons:

> "* * * Provided, that motor vehicles temporarily used by farmers for the transportation of agricultural or horticultural products from farms or groves to packing houses or to points of shipment by transportation companies shall not be held to be operated for hire."
>
> Section 1280, Comp. Gen. Laws.

It will be noted that general traffic in agricultural, horticultural, dairy, farm and fish products is not excepted from Chapter 13700, but only that part of such traffic which is **exclusively** confined to hauling products "from the point of production to the assembling or shipping point en route to primary market."

It is a well known fact that the movement and hauling referred to is both temporary and seasonal. There is a limited season, as well known to everybody, including the legislature, in which fruits and vegetables can be trans-

ported from point of production to primary market. Likewise with fish and oysters, the legally closed season on fish, oysters and shrimp necessarily makes movements of these articles seasonal and temporary also, and of no great volume.

The volume alone, which is very small, of the movement of these various products from point of production to primary market (which is the limit of the exception) when compared to the whole traffic covered by Chapter 13700, is itself a sufficient basis of classification. As we have seen before in this brief, size alone has been held by the Supreme Court of the United States to justify a classification.

> Engel vs. O'Malley, 219 U. S. 126.
> Noble vs. Carlton (Fla. Milk Law case) decided by Three-Judge Federal Statutory Court, Jan. 3, 1930, reported in 36 Fed. (2nd) 967.

In this connection, the following quotation from the opinion of the Supreme Court of the United States is pertinent to show the propriety of basing classifications on local conditions which the legislature might know but which the Court cannot definitely know:

> "The Fourteenth Amendment is not a pedagogical requirement of the impracticable. The equal protection of the laws does not mean that all occupations that are called by the same name must be treated in the same way. The power of the state 'may be determined by degrees of evil or exercised in cases where detriment is specially experienced.' Armour & Co. vs. North Dakota, 240 U. S. 510, 517. It may do what it can to prevent what is deemed an evil and stop short of those cases in which the harm to the few concerned is thought less important than the harm to the public that would ensue if the rule laid down were made mathematically exact. The only question is whether we can say on our judicial knowledge that the Legislature of Arizona

could not have had any reasonable ground for believing that there were such public considerations for the distinction made by the present law. The deference due to the judgment of the legislature on the matter has been emphasized again and again. Hebe Co. vs. Shaw, 248 U. S. 297, 303. Of course, this is especially true when local conditions may affect the answer, conditions that the Legislature does but that we cannot know."

Dominion Hotel Co. vs. Arizona, 249 U. S. text 268.

In making the classifications dealing with haulers of agricultural, horticultural, dairy, farm and fish products, from point of production to primary markets, the Legislature had knowledge of the fact that such movements are seasonal and temporary, that they cannot always move on a fixed schedule on regular routes or between fixed termini, that the volume of this movement is small compared to the general movement of commodities over the highways otherwise, and that the traffic was in perishable commodities and commodities which are the necessities of life. The exception made had already been made in other State statutes which have been in force and unchallenged for years. It is confined to those who hauled the named perishables **exclusively**. It is furthermore confined to that portion of the distributive haul which lies between the point of production and the primary market or packing houses **only**, and does not extend to general traffic from the markets to the consumer or between dealers.

Such a classification is clearly justified and has not been overturned in the manner required by Hiers vs. Mitchell, supra.

The last exception is that of taxicabs and hotel busses. It is not hard to conceive why these are excluded. Taxicabs are usually operated only in cities and towns, usually those of some size and incorporated. Nearly every one of them is subject to local municipal control, requirements

of indemnity bonds, taxation and the like. They deal only with passengers and generally neither operate on regular schedules between fixed termini or over regular routes. Because of these factors, the terms of Chapter 13700 excepts them.

In the case of:

State vs. LeFebvre, 219 N. W. 167,

The Supreme Court of Minnesota sustained a statute similar to Chapter 13700 which excepted persons who hauled school children ,and those who transported farm and dairy products from its operation, as against the same kind of attack made on the Act in question here.

In the last cited case the court dealt with and sustained as constitutional a provision of the Minnesota law which contained a clause excepting from its operation "motor vehicles used exclusively in transporting children to or from school, and motor vehicles used by any transportation company engaged exclusively in transporting agricultural, horticultural, dairy or other farm products from the point of production to the primary market, or to motor vehicles used exclusively in transporting or delivering dairy products or to motor vehicles engaged exclusively in transporting or delivering freight within any city or village in this State or between contiguous villages or cities, or by any transportation company engaged in operating taxicabs, or hotel busses to or from a depot to a hotel."

Chapter 13700 does not deny to appellant the equal protection of the laws, because of the classifications made. Innumerable classifications of all kinds, as varied as the exigencies of occasions required or ingenuity could suggest have been upheld.

The following are only a few of these selected at random:

Classifying railroads:

M. P. Ry. Co. vs. Mackey, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107.

M. & St. L. Railway Co. vs. Beckwith, 129 U. S. 1, 9 Sup. Ct. 207, 32 L. Ed. 585.

C. N. O. & T. P. R. R. vs. Kentucky, 115 U. S. 321, 6 Sup. Ct. 57, 29 L. Ed. 414.

Tullis vs. Lake Erie & Western, 175 U. S. 348, 20 Sup. Ct. 136, 44 L. Ed. 192.

Aluminum Co. vs. Ramsey, 222 U. S. 251, 32 Sup. Ct. 76, 56 L. Ed. 185.

Classifying the succession to property:

Magoun vs. Illinois Trust and Savings Bank, 170 U. S. 294, 18 Sup. Ct. 599, 42 L. Ed. 1043.

Classifications of coal mines exempting those not employing more than five (5) men from its operations:

Consolidated Coal Co. vs. Illinois, 185 U. S. 203, 22 Sup. Ct. 616, 46 L. Ed. 872.

And those employing not over ten (10) persons:

McLean vs. Arkansas, 211 U. S. 539, 29 Sup. Ct. 206, 53 L. Ed. 315.

An act exempting banks and trust companies from the operation of the usury law:

Griffith vs. Connecticut, 218 U. S. 563, 31 Sup. Ct. 17, 54 L. Ed. 1151.

Laws forbidding aliens not eligible to citizenship from acquiring and leasing land:

Porterfield vs. Webb, 263 U. S. 225, 44 Sup. Ct. 21, 68 L. Ed. 278.

Webb vs. O'Brien, 263 U. S. 313, 44 Sup. Ct. 112, 68 L. Ed. 318.

Frick vs. Webb, 263 U. S. 326, 44 Sup. Ct. 115, 68 L. Ed. 323.

Excluding foreign corporations from the exemption of an inheritance tax on property devised for educational and religious purposes:

Board of Education vs. Illinois, 203 U. S. 553, 27 Sup. Ct. 171, 51 L. Ed. 314; 8 Anno. Cases 157.

Exemption from taxation of companies whose gross annual income did not exceed a given figure:

Citizen's Telephone Co. vs. Fuller, 229 U. S. 322, 33 Sup. Ct. 833, 57 L. Ed. 1206.

Jackson vs. Fuller, 229 U. S. 336, 33 Sup. Ct. 837, 57 L. Ed. 1215.

A franchise tax exempting corporations wholly engaged in manufacturing or mining within the State:

People vs. Roberts, 171 U. S. 658, 19 Sup. Ct. 58, 43 L. Ed. 323.

The exemption of subways from special franchise taxes:

People, ex rel., Metropolitan Street Railway Co. vs. State Board of Tax Commissioners, 199 U. S. 1, 25 Sup. Ct. 705, 50 L. Ed. 65; 4 Anno. Cases 381.

People, ex rel., Brooklyn City Railroad Co. vs. State Board of Tax Commissioners, 199 U. S. 48, 25 Sup. Ct. 713, 50 L. Ed. 79.

People, ex rel., Twenty-third Street Railway Co. vs. State Board of Tax Commissioners, 199 U. S. 53, 25 Sup. Ct. 715, 50 L. Ed. 85.

An act forbidding the employment of women for more than eight hours a day but exempting nurses and others employed in hospitals:

Bosley vs. McLaughlin, 236 U. S. 385, 35 Sup. Ct. 345, 59 L. Ed. 632.

Virtually all Workman's Compensation Acts exempt from their provisions certain classes of employers, such as farmers and domestics, and practically all of them, are, by their terms, inapplicable to persons employing a certain minimum number of servants:

Jeffry Mfg. Co. vs. Blagg, 235 U. S. 571, 35 Sup. Ct. 167, 59 L. Ed. 364.

N. Y. Central Railroad vs. White, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917-D 1.

Annotated Cases 1917-D, 629.

Middleton vs. Texas Power and Light Co., 249 U. S. 152, 39 Sup. Ct. 227, 63 L. Ed. 527.

The Kansas Banking Act preferring depositors against other creditors was held to constitute no unlawful discrimination:

Assaria State Bank vs. Dolley, 219 U. S. 121, 31 Sup. Ct. 189, 55 L. Ed. 123.

The New York Housing Laws applicable only to landlords renting dwelling houses was sustained as affording a reasonable classification.

Marcus Brown Holding Co. vs. Feldman, 256 U. S. 170, 41 Sup. Ct. 465, 65 L. Ed. 877.

The Florida Act of 1913 imposing an additional tax on vendors of goods, accompanied by coupons, profit-sharing certificates, etc., was a reasonable classification:

Rast vs. Van Deman & Lewis Co., 240 U. S. 342, 36 Sup. Ct. 370, 60 L. Ed. 679, L. R. A. 1917-A, 421.
Annotated Cases 1917-B, 455.

And the Florida statute of 1913 imposing an employer's liability on those operating boats propelled by steam, gas or electricity but excepting sailing vessels, was held to be constitutional.

The Merrimac, 242 Fed. 572.

Probably the strongest case upholding the power of the Legislature to classify, is Erb vs. Morasch, 177 U. S. 586, 20 Sup. Ct. 819, 44 L. Ed. 897. In that case the City Council of Kansas City passed an ordinance regarding the running of railroad trains. It was made unlawful to operate any train of cars at a greater speed than six miles an hour. Section "8" of the ordinance excepted by name the Interstate Rapid Transit Railway Company of Kansas City. The Supreme Court of the United States held that this did not make an arbitrary and unreasonable classification in denial of the equal protection of the laws. Mr. Justice Brewer saying:

"With the presumption always in favor of the validity of legislation, state or municipal, if the ordinance stood by itself the courts would be compelled to presume that the different circumstances surrounding the tracks of the respective railroads were such as to justify a different rule in respect to the speed of their trains."

POINT 9.

THE TAX IS NOT CONFISCATORY NOR UNREASONABLE IN A CONSTITUTIONAL SENSE, NOR IS THERE ANY BASIS FOR THIS COURT TO SO DECLARE ON THE RECORD HERE PRESENTED.

A sufficient answer to this contention is found in the following quotation of a recent opinion handed down by the Supreme Court of the United States:

"Even if the tax should destroy a business it would not be made invalid or require compensation on that ground alone. Those who enter upon the business take that risk (citing cases). We need not consider whether abuses of the power might go to such a point as to transcend it, for we have not such a case before us. The acts must be judged by their contents, not by the allegations as to their purpose in the complaint. We know of no objection to exacting a discouraging rate as the alternative to giving up a business when the Legislature has the full power of taxation. The case is different from those where the power to tax is limited to inspection fees and the like as in Postal Telegraph-Cable Co. vs. Taylor, 192 U. S. 64, 72."

See Alaska Fish Co. vs. Smith, 255 U. S. text 48-49.

We are not called on in this case to consider an alleged abuse of the legislative power to levy license taxes. It is a matter of common knowledge that a number of bus and truck operators have applied for and been granted cer-

tificates of public convenience and necessity and are now operating a profitable business and paying the taxes collectible under Chapter 13700. The fact that the particular business being conducted by the appellant, E. S. Smith, does not permit him to pay the taxes and make a profit on his haul, even if that be admitted to be true, would not render the law unconstitutional as confiscatory.

Laws levying license taxes will not be held void as unreasonable and arbitrary unless the amount of the tax is so great or the classification so palpably arbitrary as to be beyond the necessity for the legislation or equivalent to an impairment of constitutional rights of property or tend to prevent a great number, if not all persons, from pursuing otherwise lawful occupations, which do not impair public safety, public health or injure public property.

State vs. Allen, 83 Florida 219; 91 Southern 104.

Legislative regulations imposing license taxes will not be interfered with unless purely arbitrary and unreasonable from every conceivable view.

Pen. Cas. Co. vs. State, 68 Florida 411.
Pullman Co. vs. Knott, 70 Florida 9; 69 Southern 703; 243 U. S. 447.

The Florida Constitution contains no limitation upon the power of the Legislature to impose license taxes within its jurisdiction except with due process and equal protection and contract rights shall be observed and interstate commerce shall not be burdened or the exercise of Federal power interfered with.

Amos vs. Gunn, 84 Florida 285; 94 Southern 615.

The reasonableness of a tax is for the Legislature and not for the courts to determine when taxes are levied by

the Legislature itself which has plenary power over the subject, but even where the reasonableness can be inquired into as in the case of taxes imposed by municipal corporations under delegated authority, the reasonableness of a tax upon an occupation or business cannot be determined by the extent of the business of a single individual since there may be competition or negligence or other circumstances affecting the extent of the business which cannot be charged to the taxing power.

Western Union Tel. Co. vs. Decatur, 81 Southern 199.

As pointed out above the Court has no power to strike down a tax as confiscatory unless it has a tendency to so operate under every conceivable circumstance. The mere fact that some business cannot profitably go on and pay the tax is not the test, as the Legislature has constitutional power to impose a discouraging rate of taxation as we have pointed out.

At the same time the many busses and trucks now operating under the law and paying the tax furnish an ample testimonial to the fact that there are many conceivable circumstances where the tax has been found to be perfectly reasonable.

This Court will have to write a new doctrine of constitutional law as applied to taxation in order to hold that it will measure the constitutionality of a tax in the way it measures the constitutionality of a law fixing a particular scale of public utility rates and enter into an investigation of the subject of whether or not a particular business can make enough money to profitably operate and pay taxes.

POINT 10.

NO SHOWING HAS BEEN MADE THAT THE STATUTE VIOLATES SECTION 10 OF ARTICLE I OF THE CONSTITUTION OF THE UNITED STATES OR THAT IT IMPAIRS THE OBLIGATION OF CONTRACTS HELD BY THE APPELLANT.

The above point was not argued in the Court below nor passed upon by that Court.

It is respectfully submitted that the point is not properly presented nor raised in this Court on the record here.

However, it has been held by this Court that those who are subject to regulation by the State in the exercise of its police power cannot prevent or postpone the exertion by a State of that power by interposing the contract clause of the Federal Constitution as an obstacle to the exertion of that power.

Hudson County Water Co. vs. McCarter, 209 U. S. 349 (357).

Knox vs. Lee, 12th Wall. 457, (550,551).

C. B. & Q. R. R. Co. vs. McQuire, 219 U. S. 549 (567).

A. C. L. R. R. Co. vs. Goldsboro, 232 U. S. 548 (558).

Union Drygoods Co. vs. Georgia Public Service Commission, 248 U. S. 372.

Producers Transportation Co. vs. Railroad Commission, 251 U. S. 228 (232).

If, therefore, the State of Florida had the power to pass an Act regulating contract carriers for hire by requiring them to secure a special permit to use the highways of the State for the transaction of their business and by requiring them to pay a special tax for the privilege granted, the fact that Smith, the appellant, as a particular contract carrier had a special contract for

the hauling of goods, cannot operate to defeat the validity of the Florida statute, as we have pointed out in our citation of the foregoing holdings of this Court.

If the appellant applies for and obtains a certificate of public convenience and necessity and pays the tax required of him by the Florida law, he can still perform whatever contract he may have with the others who have employed him to haul their goods.

Thus far the record does not disclose that he has ever attempted to secure a certificate of public convenience and necessity, nor made any effort to pay the tax imposed upon the privilege involved in such a certificate.

We, therefore, respectfully insist that there is nothing in the assignment of error based upon this proposition which the Court can consider on the record now before the Supreme Court of the United States in this case.

CONCLUSION

It is respectfully submitted that this Court should affirm the judgment of the Supreme Court of Florida.

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APPENDIX TO BRIEF

CHAPTER 13700, ACTS 1929
LAWS OF FLORIDA
(SENATE BILL NO. 87)

AN ACT Providing for the Supervision and Regulation of Persons, Firms, Corporations and Associations Owning, Controlling, Operating or Managing Motor Vehicles Used in the Business of Transporting Persons or Property for Compensation Over the Public Highways of the State; Defining Auto Transportation Companies and Providing Supervision and Regulation Thereof by the Railroad Commission of the State of Florida and Providing for the Enforcement of the Provisions of This Act and for the Punishment of Violations Thereof and Imposing a Mileage Tax and Providing for the Disposition of the Revenue Raised by the Same; and Repealing All Acts Inconsistent with the Provisions of this Act.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Definitions:

(a) The word "Commission" means the Railroad Commission of this State.

(b) The term "Corporation" when used in this Act means a corporation, a company, association, or joint stock association.

(c) The term "person" means an individual firm or co-partnership.

(d) The word "certificate" means the Certificate of Public Convenience and Necessity authorized to be issued under the provisions of this Act.

(e) The term "public highway" means every public street, road or highway in this State.

(f) The term "motor vehicle" shall include all vehicles or machines propelled by any power other than muscular used upon the public highways for the transportation of persons or property for compensation as common carriers, except motor vehicles used exclusively in transporting children to or from school, and motor vehicles used by a transportation company engaged exclusively in transporting agricultural, horticultural, dairy or other farm products from the point of production to the primary market, or to motor vehicles used exclusively in transporting or delivering dairy products, or by any transportation company engaged in operating taxicabs, or hotel busses to or from a depot to a hotel in the same town or city.

(g) The words "between fixed termini or over a regular route" when used in this Act means the termini or route between or over which any auto transportation company usually or ordinarily operates any motor vehicle, even though there may be departures from said termini or route, whether such departures be periodical or irregular, whether or not any motor propelled vehicle is operated by any auto transportation company "between fixed termini or over a regular route" within the meaning of this Act, shall be a question of fact to be determined by the Commission, and the finding of the Railroad Commission thereon shall be final except as to appeal and review as hereinafter provided.

(h) The term "auto transportation company" when used in this Act means every corporation or person, their lessees, trustees or receivers, owning, controlling, operating or managing any motor-propelled vehicle not usually operated on or over rails, used in the business of transporting persons or property for compensation or as a common carrier over any public highway in this State between fixed termini or over a regular route; Provided, That the term "auto transportation company" as used in this Act, shall not include corporations or persons engaged exclusively in the transportation of children to or from school, or any transportation company engaged exclusively in the transporting agricultural, horticultural,

dairy or other farm products and fresh and Salt Fish and Oysters and Shrimp from the point of production to the assembling or shipping point enroute to primary market or to motor vehicles used exclusively in transporting or delivering dairy products or any transportation company engaged in operating taxi-cabs, or hotel busses from a depot to a hotel in the same town or city. That those passenger busses, that operate over a definite route on regular schedules and which are regulated by the legislative body of a city, furnishing public transportation wholly within the corporate limits of any city or between cities whose boundaries adjoin, are hereby expressly excluded from the provisions of this Act.

(i) For the purpose of this Act all vehicles equipped to carry a load which are attached to and drawn by a motor vehicle are hereby defined as trailers and shall be classed as motor vehicles and subject to the provisions of this Act.

(j) The term width of tread means the width of the vehicle measuring from the center of the tread of outside tire to the center of tread of the opposite outside tire.

Section 2. No auto transportation company shall operate any motor vehicle for the transportation or persons or property for compensation on any public highway in this State without first having obtained from the Railroad Commission a certificate that the present or future public convenience and necessity requires or will require such operation, but no certificate shall be required for operation exclusively within the limits of an incorporated city or town. The Railroad Commission may at any time for a good cause suspend and upon notice to the grantee of any certificate an opportunity to be heard, revoke, alter or amend any certificate issued under the provisions of this section.

Section 3. Application for such Certificate of Public Convenience and Necessity shall be made by such corporation, person, firm or association, their lessees, trustees, or receivers to the Railroad Commission; such ap-

plication shall be in writing verified by the applicant and shall specify the following matters.

1. The name and address of applicant and the names and addresses of its officers, if any.

2. The public highway or highways over which, and the fixed termini or the regular route, if any, between which, or over which applicant intends to operate.

3. The kind of transportation, whether passenger or freight, or both, in which applicant intends to engage, together with a brief description of each vehicle and motor power which applicant intends to use, including the seating capacity thereof, if for passenger traffic, or tonnage, if for freight traffic, and including the size and weight of such vehicles.

4. The proposed time schedule of operation.

5. The schedule or tariff, showing all passenger fares or freight rates proposed to be charged between the several points or localities to be served.

6. Whether or not the said applicant is or has been operating on said routes or other routes in the State, and for what length of time and upon what time schedule of operation and upon what schedule or tariff for passenger fares or freight rates.

Upon filing of said application the Railroad Commission shall fix a time for hearing of said application, which shall not be less than five days nor more than thirty days subsequent to the filing of said application, and no application shall be granted or a Certificate of Convenience and Necessity issued without a hearing by the Railroad Commission. Notice of such hearing shall be given to the applicant and to all transportation companies serving any part of the route between the fixed termini and to the mayor or chief magistrate of each city and town in or through which the applicant desires to operate at least five full days prior to said hearing, which said notice shall recite the fact of the filing of such application, the time and the place of the hearing of the same. A copy of said notice shall be mailed at least five

days prior to the time for such hearing to any transportation company holding a Certificate of Public Convenience and Necessity and operating over the route or any part of the route specified in said application.

At the time specified in said notice, or at such time as may be fixed by the Commission, a public hearing upon said application shall be held by the Commission. At or after such hearing the Commission may issue a Certificate of Public Convenience and Necessity, as prayed for or refuse to issue the same, or may issue the same with modification, or upon such terms and conditions as in its judgment the public convenience and necessity may require; Provided, That in granting application for certificate, the Commission may take into consideration the length of time the applicant has operated a scheduled motor vehicle service between the termini named in the application; the general standard of the service maintained during this period; the reliability of the applicant and his sense of responsibility toward the public as shown during the period of his operation; his court record as well as the effect that the granting of such certificate may have upon other transportation facilities within the territory sought to be served by such applicant, and also the effect upon transportation as a whole within said territory and any other matters tending to qualify or disqualify him as a common carrier. Provided, That a Certificate of Public Convenience and Necessity shall upon hearing be granted as a matter of right to such Auto Transportation Companies operating in good faith on the 19th day of April, 1929, over the route for which such certificate shall be sought, who shall comply in full with the provisions of this Act.

When application is made by an Auto Transportation Company for a certificate to operate in a territory or on a line already served by a certificate holder under this Act the Commission shall grant same only when the existing certificate holder or holders serving such territory fail to provide service and facilities to the satisfaction of said Commission.

Each Certificate of Convenience and Necessity issued under the provisions of this Act shall contain the following matters:

1. The name of the grantee.

2. The public highway or highways over which, and the fixed termini between which the grantee is permitted to operate.

3. The kind of transportation, whether passenger or freight, or both, in which the grantee is permitted to engage, together with a statement of the number of vehicles to be operated and the maximum seating or tonnage capacity of the vehicle or vehicles which the grantee is permitted to operate.

4. Such additional provisions and limitations as the Commission shall deem necessary or proper to be inserted in the certificate.

No Certificate of Public Convenience and Necessity issued under the provisions of this Act may be assigned or transferred without the consent of the Railroad Commission authorizing such transfer.

No certificate shall be issued for the operation on any highway in the State of any motor vehicles of greater width of tread than eighty-four (84) inches and greater loaded weight than eighteen thousand (18,000) pounds for passenger or freight traffic. The Commission is hereby authorized to prescribe the maximum width of tonneau or body including load of motor vehicles used in either passenger or freight service, taking into consideration the width of road over which the same is to be operated. And the said Commission is further authorized to suspend temporarily, when the condition of the public highway requires it, the operation of motor vehicles, either for passenger or freight transportation, along and over any public highway of the State, and notice of such suspension shall be given to every holder of a certificate for operation over the said highway and to the public by publication in some newspaper or newspapers in general circulation in the territory of the route.

Section 4. The Commission shall, at the time of granting a certificate to operate any transportation company for transporting persons or property, fix and determine the amount of the bond to be given by the applicant for the protection, in case of passenger vehicle, of the passengers and baggage carried in said vehicle and of the public against injury caused by negligence of the person or corporation operating the said vehicle, and in the case of the vehicle transporting freight, for the protection of the said freight so carried and of the public against injuries received through negligence of the person or corporation operating said freight carrying vehicle; and it shall be the duty of the applicant to procure and file with the Commission the said bond for liability and property damage, including loss of baggage when same has been checked in accordance with the rules prescribed by the Commission, giving the said bond or bonds in a surety company authorized to do business in the State of Florida, or deposit in lieu of said surety bonds, bonds of the United States Government or of any city or county in the State of Florida approved by the said Commission. The said bonds shall be conditioned to indemnify passengers and the public receiving personal injuries by any act of negligence, and for damages to property of any person other than the assured; and such bonds shall contain such conditions, provisions, and limitations as the Commission may prescribe, and said bonds shall be payable to the State of Florida, and shall be for the benefit of and subject to action thereon by any person or persons who shall have sustained an actionable injury protected thereby, notwithstanding any provisions in said bond to the contrary, and every bond or insurance policy given shall be conclusively presumed to have been given according to and to contain all of the provisions of this Act. And no certificate shall be valid until such bond has been filed and approved, and no such bond so accepted shall be cancelled by the company issuing the same except upon ten days' notice to the Commission; and upon such notice being given by the company issuing said bond or bonds, the certificate of the per-

son or corporation giving bond shall be revoked, unless a new bond shall be filed and accepted before the date for the cancellation of the said bond; Provided, however, that the applicant may, in the discretion of the Commission, be allowed to file in lieu of bond an insurance policy, which shall be approved by the Commission, with some casualty company or insurance company or casualty or insurance carrier authorized to do business in the State of Florida.

Section 5. The Railroad Commission of the State of Florida is hereby vested with power and authority to supervise and regulate every auto transportation company in the State, to fix or approve the rates, fares, charges, classifications, rules and regulations for each auto transportation company, to regulate the service and safety of operations of each such auto transportation company; to prescribe a uniform system and classification of accounts to be used, which among other things, shall set up adequate depreciation charges; to require the filing of annual and other reports and all other data by said auto transportation companies; and to supervise and regulate auto transportation companies in all other matters affecting the relationship between such companies and the traveling and shipping public. The Commission shall have power and authority by order to prescribe rules and regulations applicable to any and all such auto transportation companies. The Commission, in the exercise of the jurisdiction conferred upon it by this Act, shall have power and authority to make orders and prescribe rules and regulations affecting such auto transportation companies, notwithstanding the provisions of any ordinance or permit of any incorporated city or town, city and county, or county, or village, and in case of conflict between any such order, rule or regulation, any such ordinance or permit, the order, rule or regulation of the Commission shall in each instance prevail. No municipality shall have the right to require such auto transportation company to furnish any bond

or insurance policy, or pay any license, fee or tax except as herein provided.

Section 6. Upon the taking effect of this Act, it shall be the duty of every such auto transportation company to forthwith file with its application for a certificate of Public Convenience and Necessity a schedule of its rates and fares, and a time schedule of all motor vehicles operated, all of which shall be kept on file by the Commission, subject to public inspection. The Commission shall require each auto transportation company to keep open for for public inspection at designated offices so much of said schedule of rates and fares and time schedules as it deems necessary for the public information.

Whenever such rates or fares or time schedules are found to be unreasonable, the Commission, upon its own motion, or upon complaint, shall upon hearing as herein provided, prescribe reasonable rates and time schedules to take the place of those found unreasonable, and such new rates shall be filed in place of the rates of schedules superseded. No rates or time schedules filed with the Commission shall be changed by any such auto transportation company without an order of the Commission sanctioning the same. It shall be unlawful for any transportation company to collect or receive a greater or less rate or charges for any service rendered by it than the transportation charge made in the schedules on file with the Commission, and no new rates shall take effect until the date named by the Commission.

Section 7. The Commission may upon complaint, or upon its own motion, that any auto transportation company is violating the provisions of this Act or any of the rules or regulations prescribed by the Commission, or is violating any of the laws of the State, or any requirement of its Certificate of Public Convenience and Necessity, issue its order to the said auto transportation company notifying it to appear before the Commission at a fixed time and place at which time and place the Commis-

sion shall investigate the complaint made, and if it shall be satisfied after such hearing that the said auto transportation company holding a certificate has wilfully violated or refused to observe the laws of this State touching motor vehicles or any of the terms of the certificate issued to the said auto transportation company, or any of the commission's orders, rules or regulations, the said Commission may suspend, revoke, alter, or amend and certificate issued under the provisions of this Act to the said auto transportation company; but the holder of such certificate shall have the right to appeal to the Supreme Court of the State as is now provided by law for appeals from orders relating to railway or street railway corporations.

Section 8. Every rule, regulation, decision, order or requirement made by the said Commission under the provisions of this Act shall be deemed and held to be within its jurisdiction and powers, and to be reasonable and just and such as ought to have been made in the premises, and to have been properly made and arrived at in due form of procedure, and such as can and ought to be executed, unless the contrary plainly appears on the face thereof or can be made to appear by clear and satisfactory evidence, and shall not be set aside or held invalid unless the contrary so appears. All presumption shall be in favor of every action of the said Commission and all doubts as to its jurisdiction and powers shall be resolved in its favor. If, in any proceeding to enforce or to attack any rules, regulations, decisions or orders, any part thereof shall be found invalid the Court shall proceed to enforce such portion thereof as may be valid if the same can be done.

Section 9. In all matters of practice and procedure, and all matters of evidence and the rules of evidence and all matters involving the effect of evidence in proceedings before the Commission under the provisions of this Act, and in proceedings by the said Commission to enforce its rates, rules, regulations, decisions, orders, and

requirements made hereunder, and in proceedings against the said Commission in relation to rates, rules, regulations, decisions, orders and requirements prescribed by it, all provisions of law now existing, or which may from time to time be prescribed for observance in like cases arising under the law for the regulation of railroads, railroad companies and common carriers, shall govern and control.

Section 10. The Commission shall, so far as the Constitution of this State permits, exercise all such judicial powers as may be necessary to enable it to enforce or perform any duty, power or function conferred on it by this Act.

Section 11. No Auto Transportation Company shall operate any motor vehicle on the public highways of this State at a speed in excess of the speed now permitted by the laws of this State, but motor vehicles used exclusively for carrying of passengers may be operated at any rate not exceeding forty-five (45) miles per hour.

Section 12. An Auto Transportation Company holding a certificate of Public Convenience and Necessity as provided for in this Act may depart from the route described in such certificate if compelled to detour on account of the closing of roads, or for the purpose of transporting chartered or excursion parties to points not on such route, and not exclusively on a route served by any other certificate holder, and may receive for such service compensation as may be agreed upon between the carrier and the party or parties so served.

Section 13. Every officer, agent or employee of any corporation, and every other person who violates or fails to comply with, or who procures, aids or abets in the violation of any provision of this Act, or who fails to obey, observe or comply with any order, decision, rule or regulation, direction, demand or requirement, or any part or provision thereof, or who fails to observe any regulation as to maximum speed of operation or maximum weight of load, of the Railroad Commission, or who procures, aids or abets any corporation or person in his failure to obey,

observe or comply with any such order, maximum speed of operation, maximum weight of load, decision, rule direction, demand, or regulation, or any part or provision thereof, is guilty of a misdemeanor and is punishable by a fine not exceeding Five Hundred Dollars ($500.00) or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment.

Section 14. There shall be collected by the Comptroller of the State from every Auto Transportation Company as herein defined to which has been granted a Certificate of Public Convenience and Necessity permitting it to engage in the transportation of passengers or freight, or both, a mileage tax of one-half cent (½c) per mile on all busses with a capacity of 10 passengers or less and a mileage tax of three-fourths cent (¾c) per mile on all busses with a capacity of not more than 20 passengers nor less than 10 passengers, and a mileage tax of one cent (1c) per mile on all busses of the capacity of more than 20 passengers; and a mileage tax of one cent (1c) per mile on all trucks with a loaded capacity of less than 5,500 lbs., and a tax of two cents (2c) per mile on all trucks with a loaded capacity of 5,500 lbs., or more coming within the terms of this Act for every mile traveled by the motor vehicles of such Auto Transportation Company over the public highways of this State. This tax shall be paid quarterly beginning October 1, 1929. Provided: That at the time of issuing said Certificate of Public Convenience and Necessity and at the beginning of each calendar quarter thereafter the Comptroller of the State shall collect from each holder of such certificate the sum of Seventy-five Dollars ($75.00) as an advance payment upon the mileage tax herein levied for the ensuing quarter which said amount shall at the end of the quarter be credited to said holder of such certificate and the difference between the said amount and the correct amount of said tax shall be adjusted by the Comptroller with the said holder of such certificate.

In order to ascertain the bus mileage of every passenger bus and the truck mileage of every freight truck traveled by the holders of certificates for such purpose the

Comptroller of the State shall prescribe the books and forms of accounts to be kept by the said holder of such certificate and at the end of each current month the said holder of a certificate shall file with the Comptroller, and a duplicate thereof with the Commission, a statement verified by an officer, if the holder of such certificate is a corporation, or if the holder of such certificate is a person then by such person, showing the mileage made by said holder of such certificate during the said month. Provided further, that the mileage tax provided for in this section shall be in lieu of all other taxes and fees of every kind, character and description, except ad valorem taxes levied upon the property of such auto transportation companies and except the gasoline tax, and except the motor vehicle license tax as now provided for in Section 1285 (1011), Compiled General Laws of Florida, 1927; said motor vehicle license tax to be paid into the State Treasury and disposed of as provided for in Section 1304 (1031), Compiled General Laws of Florida, 1927. The books and records of all auto transportation companies shall be at all times open to inspection of the Comptroller of the State and of the Commission, or any agent by them appointed for such purpose, and if the said holder of such certificate shall fail to make the monthly reports herein prescribed to the Comptroller and to the Commission, or shall fail to keep said books and records as prescribed by said Comptroller of the State then upon notice in writing to said holder of such certificate of such default or defaults and the failure of the said holder of such certificate within five days to make said statement or to keep said records properly the certificate shall be revoked by the Commission, but the Commission shall, if requested by the said holder of such certificate, order a hearing upon the question of the revocation of such certificate. The Comptroller of the State shall keep a true and accurate list of all auto transportation companies to whom certificates shall be issued with the postoffice address of each.

Section 15. It shall be the duty of the Comptroller of the State to keep a separate account of all moneys collected under this Act and any and all moneys so collected after deducting the necessary expenses incurred by the Comptroller of the State in carrying out the provisions of this Act shall be paid to the State Treasurer monthly; the State Treasurer shall credit the Railroad Commission fund with five per cent (5%) of the moneys so collected and paid to him to cover the expenses of the administration of this Act by the said Commission, and shall distribute the balance as follows: To each county whose highway system is used as a part of the route authorized in the Certificate of Public Convenience and Necessity issued to any auto Transportation company its part of said balance in the proportion that the bus mileage traveled over its highway system bears to the entire bus mileage traveled by the motor vehicle of said auto transportation company; such amounts shall be quarterly remitted to the County Commissioners of each of said respective counties by warrant of the Comptroller on the State Treasurer, in like manner as other payments by State warrants are made, to be paid by said County Commissioners to the bond trustees of the county bonds, to be used by said trustees to pay the interest on and provide a sinking fund to retire the County bonds issued for the purpose of constructing the State System or the County System of good roads within said county or to be used by said County Commissioners for said purpose.

Section 16. The Commission shall employ such necessary clerks, inspectors and employees on such terms and conditions as said Commission shall deem advisable and necessary to carry out the provisions of this Act.

Section 17. Neither this Act nor any provision hereof shall apply or be construed to apply to commerce with foreign nations or commerce among the several States of the union except insofar as the same may be permitted under the provisions of the Constitution of the United States and the Acts of Congress.

Section 18. If any section, sub-section, sentence, clause or phrase of this law is for any reason held unconstitutional such decision shall not affect the validity of the remaining portions of this law. In case the provisions of this law providing for the distribution among the counties of this State of the balance of the net proceeds of all moneys collected under this Act after the five per cent (5%) thereof has been credited to the Railroad Commission fund, is, for any reason declared or found to be invalid then in that event such balance of such proceeds above described shall be paid into the State Road License Fund and shall be used for the construction and maintenance of State roads under the direction of the State Road Department.

Section 19. That no auto transportation company shall charge, demand, collect, or receive a greater or less or different compensation for the transportation of persons or property, or for any service in connection therewith, than the rates, fares, and charges applicable to such company as specified in its tariffs filed with and approved by the Commission and in effect at the time; nor shall any such company refund or remit in any manner or by any device any portion of the rates, fares, or charges so specified, or extend to any person, firm, copartnership, or corporation, or other organization, or association, privileges or facilities in the transportation of persons or property except such as are regularly and uniformly extended to all; and no such company shall directly or indirectly, issue, give, tender, or honor any free fares except to its bona fide officers, agents employees, and members of their immediate families; Provided, that auto transportation companies under the Act may exchange free transportation within the limits of this section.

Section 20. That distinguishing number plates shall be prescribed and furnished by the Commission, which plate shall be displayed at all times upon each motor vehicle authorized for operation under this Act, for

which the Commission shall charge and each auto transportation company shall pay a fee of fifty cents each. Transfers of number plates from one vehicle to another are hereby prohibited. The fees derived from the issuance of such number plates shall be paid into the State Treasury to the credit of the Railroad Commission fund.

Section 21. All laws and parts of laws in conflict with the provisions of this Act be and the same are hereby repealed.

Section 22. This Act shall become effective on July 1st, 1929.

Became a law without Governor's approval.

SECTION 1280, COMPILED GENERAL LAWS OF 1927

Terms "Motor Vehicle," "Local Authorities," "Owner," "Chauffeur," "Trailer," "Semi-Trailer," "Motorcycle," "Side Car," "Solid Tires," "Pneumatic Tires," "Truck," "Tractor," "For Hire," defined. That the term "Motor Vehicle" as used in this Chapter shall include motorcycles, automobiles, motor trucks, and all other vehicles operated over the public streets and highways of this State, and propelled by power other than muscular power, except traction engines, road rollers, and such vehicles as run only upon a track.

"Local Authorities" shall include all officers and public officials of the several counties and municipalities of the State.

"Owner" shall include any person, firm, corporation, or association, controlling any motor vehicle by right of purchase, gift, lease or otherwise.

"Chauffeur" shall include any person operating any motor vehicle as an employee of the owner thereof; provided the term "Chauffeur" shall not apply to a person using a motor driven vehicle as an incident to their employment in some other capacity.

"Trailer" as defined in this Chapter shall include all four-wheel vehicles coupled to or drawn by a motor vehicle.

"Semi-trailer" as defined in this Chapter shall include any two-wheel vehicle coupled to or drawn by any motor vehicle.

"Motorcycle side car" as defined in this Chapter shall include any attachment to a motorcycle for extra conveying capacity, requiring the use of one or more extra wheels.

"Solid tires" as defined in this Chapter shall include all tires of any material or substance, which do not depend upon confined air for the support of the load.

"Pneumatic tires" as defined in this Chapter shall include all tires made of rubber and fabric inflated with air.

"Trucks" as defined in this Chapter shall include any motor vehicle designed or used principally for carrying things other than passengers and includes a motor vehicle to which has been added a cabinet box, platform, rack or other equipment for the purpose of carrying merchandise other than the person or effects of the passengers. Also any unit consisting of tractor and trailer so constructed as to haul merchandise or loads other than persons.

"Tractor" as defined in this Chapter shall include any motor vehicle having four (4) or more wheels designated or used for drawing other vehicles, but having no provision for carrying loads independently.

"For hire" as defined in this Chapter shall include all motor driven vehicles, or trailers hauled by a motor vehicle, in use for transporting persons, commodities or materials for compensation, or such other motor vehicles as may be let or rented to another for a consideration. Provided, that motor vehicles temporarily used by farmers for the transportation of agricultural or horticultural products from farms or groves to packing houses or to points of shipment by transportation companies shall not be held to be operating for hire.

Provided further, that motor vehicles used for transporting school children to and from school under contract with school officials shall not be deemed to be in use for hire.